

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

2009 MSPB 47

Docket No. SF-0752-07-0027-X-1

**Patchara Baumgartner,
Appellant,**

v.

**Department of Housing and Urban Development,
Agency.**

March 27, 2009

David S. Handscher, Esquire, San Francisco, California, for the appellant.

William M. Elsbury, Esquire, San Francisco, California, for the agency.

BEFORE

Neil A. G. McPhie, Chairman
Mary M. Rose, Vice Chairman

OPINION AND ORDER

¶1 This case is before the Board on a Recommendation of the administrative judge finding the agency in noncompliance with a settlement agreement entered into the record in *Baumgartner v. Department of Housing & Urban Development*, MSPB Docket No. SF-0752-07-0027-I-1 (March 7, 2007). Specifically, the administrative judge found, that to be in compliance with the settlement agreement, the agency should have reassigned the appellant to a Labor Relation

Specialist/Contractor Industrial Relations Specialist position* with all the benefits accruing from such a reassignment when the agency first received authority to fill the position. For the reasons set forth below, we find the agency is now in compliance and dismiss the petition for enforcement as moot.

BACKGROUND

¶2 On October 2, 2006, the agency suspended the appellant from her Project Manager (GS-12) position for 30 days. The appellant appealed the agency's suspension action to the Board's Western Regional Office on October 5, 2006. *See* Initial Appeal File ("IAF"), Tabs 1 and 10. While the appeal was pending, however, the parties reached a settlement. After the administrative judge determined that the settlement agreement was lawful on its face and that the parties understood and freely agreed to its terms, he entered the agreement into the record for enforcement purposes in accordance with the parties' wishes. As part of the agreement, the appellant agreed to withdraw her Board appeal, and the administrative judge accordingly dismissed the appeal, noting that the Board retains jurisdiction to enforce the settlement agreement's terms. IAF, Tab 10.

¶3 On August 6, 2008, the appellant, through counsel, filed a petition for enforcement of the settlement agreement claiming that the agency had failed to comply with a key provision. *See* Compliance File ("CF"), Tab 1. Specifically, the appellant contended that the agency had not complied with section 1 (e) of the agreement that stated:

Within 30 calendar days of the parties signing this Agreement temporarily detail (assign) Appellant from her present position in the Office of Multifamily Housing in the Agency's San Francisco Office

* The settlement agreement required that the agency transfer the appellant into the position of Labor Relation Specialist, GS-12, when the San Francisco Office of Labor Relations was given the authority to do so. Subsequent to the agreement, however, the agency gave a new title to the Labor Relation Specialist position. The new title for that position is "Contractor Industrial Relations Specialist."

to the Office of Labor Relations in the Agency's San Francisco Office. The detail will continue in increments of 120 days for at least one year or until the San Francisco Office of Labor Relations is given authority to fill the position of Labor Relation Specialist, GS 12, at which time Appellant will be transferred into the Labor Relations Specialist position. In the unlikely event that the detail cannot be continued for more than one year or until the San Francisco Office of Labor Relations is given authority to fill the position of Labor Relations specialist, GS 12, the parties will meet and make every effort to arrange for a mutually agreeable detail or alternative solution.

Id. The appellant pointed out that when the San Francisco Office of Labor Regulations was given authority to fill the position of Labor Relations Specialist, GS 12, in April 2008, a candidate other than her was selected for the position. *Id.*

¶4 In a Recommendation dated December 4, 2008, the administrative judge agreed that the agency was in noncompliance with the settlement agreement and recommended that the Board grant the appellant's petition for enforcement. CF, Tab 9. The administrative judge found that, even though the agency had reassigned the appellant to the San Francisco Office of Labor Relations in the position of Contractor Industrial Relations Specialist/Labor Relations Specialist position, GS 12, following the agency's earlier selection of another employee, the agency was not in compliance with the settlement agreement because the earlier selection had promotion potential to a GS-13 level and her position had no such promotion potential. *Id.* The administrative judge reasoned that the appellant was entitled to be transferred to the first Labor Relations Specialist position, GS 12, available after the agency received authority to fill the position, and that if the first position had the benefit of having promotion potential to a GS 13 level, the appellant had the right to that benefit. *Id.*

¶5 The administrative judge recommended that the Board order the agency to transfer the appellant to one of the Contractor Industrial Relations Specialist positions that was originally announced in April 2008; i.e., the time when the

agency was originally authorized to fill this position. The administrative judge also recommended that the Board order the agency to afford the appellant all the benefits that would have accrued from such a transfer. Finally, the administrative judge directed the agency to file evidence of compliance with the Clerk of the Board and notified the appellant that she may respond to any evidence of compliance by the agency within 20 days of the date of service of the agency's submission. *See* Compliance Referral File (CRF), Tab 1. In bold-type print, the administrative judge advised the appellant that if she does not respond to the agency's evidence of compliance, the Board may assume that she is satisfied and dismiss the petition for enforcement. *Id.*

ANALYSIS

¶6 The Board has broad authority to enforce the terms of a settlement agreement entered into the record. *See McClain v. U.S. Postal Service*, [40 M.S.P.R. 66](#), 70 (1989); *Richardson v. Environmental Protection Agency*, [5 M.S.P.R. 248](#), 250 (1981), *as modified*, *Shaw v. Department of the Navy*, [39 M.S.P.R. 586](#), 590-91 (1989). Moreover, because a settlement agreement is a contract, the Board will adjudicate an enforcement proceeding relevant to a settlement agreement in accordance with contract law. *See McClain*, 40 M.S.P.R. at 69, 70; *Greco v. Department of the Army*, [852 F.2d 558](#), 560 (Fed. Cir. 1988). Thus, under settled contract law, the party alleging breach of a settlement agreement has the burden of proving such breach. *See Reniere v. Department of Agriculture*, [62 M.S.P.R. 648](#), 651 (1994). Moreover, under case law and the Board's regulations, the agency has a heavy burden of production regarding compliance. *Id.*; *Golsby v. Department of Homeland Security*, [100 M.S.P.R. 25](#), ¶ 7 (2005).

¶7 In the agency's response to the Recommendation, the agency agreed that the position which the appellant currently occupies would be afforded potential for promotion to a GS-13 level and that the transfer to the Contractor Labor

Relations Specialist position would be effective as of the date the agency had authority to fill the positions in April 2008. The agency also stated its intention to supply the Board with Form SF-52 as evidence that this has been accomplished. *See* Compliance Referral File (“CRF”), Tab 4. In response, however, the appellant’s counsel stated that the agency was not in full compliance with the Recommendation because it was unclear whether the agency had actually transferred the appellant to the Contractor Industrial Relations Specialist position effective as of the date the agency had authority to fill the positions and if the position the appellant now occupied had promotion potential to a GS 13 level. CRF, Tab 5.

¶8 On February 2, 2009, the agency submitted a “Second Supplemental Submission Regarding Compliance With Administrative Judge’s Recommendation.” CRF, Tab 6. The submission shows an amended SF-52 form that specifies that the appellant’s reassignment to the Contractor Labor Relations Specialist position was April 23, 2008, the date that the agency was first authorized to fill this position. The SF-52 form also shows that appellant’s position has promotion potential to the GS-13 level. The appellant has not responded to this evidence and the 20-day response period has passed.

¶9 We find, in light of the agency’s evidence, that the agency has met its burden of production regarding compliance with the settlement agreement and the Recommendation. We find that the agency has submitted evidence that has resolved the items in the settlement agreement that were disputed, i.e., the appellant’s reassignment to the Contractor Labor Relations Specialist/Labor Relations Specialist position, GS 12, effective on the date the agency had authority to make such a selection, along with all benefits that accrue with the reassignment. Because the appellant has not responded to this evidence, the Board assumes that the appellant is satisfied with the agency’s compliance. Therefore, based on the evidence submitted by the agency, we find the agency in compliance with the Board’s final order.

ORDER

¶10 The petition for enforcement is dismissed as moot. This is the final decision of the Merit Systems Protection Board in this compliance matter. Title 5 of the Code of Federal Regulations, section 1201.183(b).

NOTICE TO THE APPELLANT REGARDING
YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, [931 F.2d 1544](#) (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that gives you this right. It is found in Title 5 of the United States Code, section 7703 ([5 U.S.C. § 7703](#)). You may read this law, as well as review the Board's regulations and other related material, at our website, <http://www.mspb.gov>. Additional information is available at the court's website, www.cafc.uscourts.gov. Of particular relevance is the court's "Guide for Pro Se Petitioners and Appellants," which is contained within the court's Rules of Practice, and Forms 5, 6, and 11.

FOR THE BOARD:

William D. Spencer
Clerk of the Board
Washington, D.C.